

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN TERRILL MIXON,

Defendant-Appellant.

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UNPUBLISHED

August 16, 2005

No. 253758

Genesee Circuit Court

LC No. 02-010783-FH

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendant appeals by leave granted his plea-based conviction for second-degree home invasion, MCL 750.110a. Defendant was sentenced to three to fifteen years in prison for the second-degree home invasion conviction. We affirm defendant's conviction, but remand this case to the trial court for resentencing. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is that the trial court failed to state substantial and compelling reasons for its sentencing departure in determining defendant's sentence. We agree.

In reviewing a trial court's sentence departure we have three applicable standards of review. Whether a factor exists is reviewed for clear error; whether a factor is objective and verifiable is reviewed de novo; and whether a reason is substantial and compelling is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 266; 666 NW2d 231 (2003).

Under Michigan's legislative sentencing guidelines, a trial court may only depart from the guidelines if it has substantial and compelling reasons to do so, and states those reasons on the record. MCL 769.34(3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In addition, the trial court's reasons for departing must be objective and verifiable. The phrase objective and verifiable has been defined to mean that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed. *Id.*

We hold that the trial court based its upward departure on defendant's failure to admit guilt. The record indicates that the trial court expressed displeasure with defendant's denial of guilt even after conviction. A sentencing court cannot, in whole or in part, base its sentence on a

defendant's refusal to admit guilt. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003).

The trial court felt that defendant was not taking any responsibility for what he did and that defendant was not "learning anything from it." The trial court went on to state that had defendant come forward and been "straight up" that it might have felt differently about the matter. The trial court was "hoping that [defendant] would come [to the sentencing] and accept responsibility for what [he did]." The trial court also indicated that "confession [was] good for the sole [sic]." It is apparent from the record that the trial court's consideration of defendant's failure to admit guilt was a major factor, if not the sole factor, in departing from the sentencing guidelines. Therefore, the trial court based its decision on defendant's failure to admit guilt and failed to offer substantial and compelling reasons for its upward departure. We conclude that the trial court abused its discretion in so doing.

Defendant requests that this Court order resentencing before a different judge. Resentencing before a different judge is not required in this case. In deciding whether resentencing should occur before a different judge, we consider: (1) whether the original judge would reasonably be expected on remand to have substantial difficulty in putting aside previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable for the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

Defendant contends the trial court's strong sentiments and bias with respect to his case warrant resentencing before another judge. Disqualification is not warranted unless a trial judge's bias or prejudice is both personal and extrajudicial. Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding. *Cain v Dep't of Corrections*, 451 Mich 470, 494-497; 548 NW2d 210 (1996). Here, there was no evidence of personal bias or prejudice necessary for the removal of the trial judge. Although the trial court was disturbed by defendant's unwillingness to accept responsibility, there is nothing in the record that indicates that the trial court would have substantial difficulty in putting aside previously expressed views or findings nor is there anything to suggest that the trial court's bias was personal and extrajudicial. Therefore, we deny defendant's request for resentencing before a different judge.

We affirm defendant's conviction, but remand for resentencing. We do not retain jurisdiction.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Donald S. Owens